84-639

Office-Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS,
CLERK

No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CLARK B. GATHERCOLE,

PETITIONER,

vs.

GLOBAL ASSOCIATES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KIM MALCHESKI
MALCHESKI, PARKER & RANDOLPH
707 Cortland Avenue
San Francisco, CA 94110
(415) 826-6900

Attorney for Petitioner

83PP

I

QUESTIONS PRESENTED

Where Petitioner Clark B. Gathercole was discharged at the age of 60 from his employment as a public aircraft pilot with Global Associates pursuant to its contract with the United States Army which incorporated the Federal Aviation Agency's mandatory retirement age of 60 for commercial airline pilots [14 C.F.R. §121.383(c)(1982)] and applied it to Global Associates' air operations at the Kwajalein Missile Range:

1. Whether, as a matter of law, age less than 60 is a bona fide occupational qualification (BFOQ) under the Age Discrimination in Employment Act (ADEA) 29 U.S.C. §621 et seq., for Global Associates' public aircraft pilots employed under contract with the United States Army.

2. Whether the Federal Aviation Agency's age 60 mandatory retirement provision for commercial airline pilots may establish as a bona fide occupational qualification for Global Associates' public aircraft pilots who were not commerical airline pilots under the jurisdiction of the Federal Aviation Agency.

3. Whether the Department of Labor regulation [29 C.F.R. §860.102 (1981)], interpreting the bona fide occupational qualification (BFOQ) exemption of the ADEA, establishes a BFOQ as a matter of law for Global Associates' public aircraft pilots.

4. Whether Global Associates' economic interest in maintaining its contract with Army requiring Global to discharge pilots at age 60 establishes a BFOQ as a matter of law.

TABLE OF CONTENTS

	Page
Petition	1
Opinions Below	1
Jurisdiction	2
Statutory and Regulatory Provisions.	2
Statement of the Case	7
Reasons for Granting the Petition...	15
Conclusion	32
Appendix A	1a
Appendix B	16a
Appendix C	39a
Appendix D	41a

TABLE OF AUTHORITIES

Cases: Page

ALPA v. Trans World Airlines, 713 F.2d 940 (2nd Cir. 1983), cert. granted, 52 U.S.L.W. 3625 (U.S. 1984) (No. 83-997), cert. granted sub nom., ALPA v. Thurston, 52 U.S.L.W. 3720 (U.S. April 2, 1984) (No. 83-1325)..... 21,27

City of Los Angeles v. Manhart, 435 U.S. 702 (1978)..... 31

Criswell v. Western Airlines, 709 F.2d 544 (9th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3722 (U.S. March 16, 1984) (No. 83-1545)..... 17,22

Dothard v. Rawlinson, 433 U.S. 321 (1977)..... 23

EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir.1981)... 27

EEOC v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983), cert. denied, __U.S.__, 104 S.Ct. 984 (1984)..... 31

EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982)... 27

Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977), cert. denied, 434 U.S. 966 (1977), reaff'm under law of the case, 627 F.2d 858 (8th Cir. 1980)..... 22,23

Monroe v. United Air Lines,
736 F.2d 394 (7th Cir. 1984).. 22

Orzel v. City of Wauwatosa,
697 F.2d 743 (7th Cir. 1983),
cert. denied, __U.S.__, 104
S.Ct. 484 (1983).....18,27,31

Smallwood v. United Air Lines,
661 F.2d 303 (4th Cir. 1981),
cert. denied, 456 U.S. 1007,
102 S.Ct. 2299 (1982)..... 21,23

Tuohy v. Ford Motor Co.,
675 F.2d 842
(6th Cir. 1982).....16,17,21,23

Statutes:

Age Discrimination in
Employment Act, Publ. L. No.
90-202, 81 Stat. 603, as
amended by Pub. L. No.
95-256, 92 Stat. 189:

29 U.S.C. §621(b)..... 2,8

29 U.S.C. §623(a)..... 3,8,9

29 U.S.C. §623(f)..... 3,8,9

29 U.S.C. §626(c)..... 9

29 U.S.C. §628..... 30

28 U.S.C. §1254(1)..... 2

28 U.S.C. §1331..... 9

28 U.S.C. §1337..... 9

49 U.S.C. §1301(36)..... 4

Regulations:

Federal Aviation Agency:
14 C.F.R. §121.383(c) (1982)... passim

Department of Labor:
29 C.F.R. §860.102 (1981)..... passim
29 C.F.R. §860.103(h) (1981)... 31

Department of Defense Procurement:
Regulations:
32 C.F.R. Vol II, §9, pt. 9
(1982)..... 7

Other Authorities:

EEOC Notice, 46 Fed. Reg. 47724,
47725..... 26

Reorganization Plan No. 1 of
1978, 43 Fed. Rg. 19807..... 26

Executive Order 12144, 44 Fed.
Reg. 37193..... 26

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

CLARK B. GATHERCOLE, PETITIONER,

v.

GLOBAL ASSOCIATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Clark B. Gathercole, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals

(App. A, infra, 1a-15a) is reported at 727 F.2d 1485. The opinion of the District Court for the Northern District of California (App. B, infra, 16a-38a) is reported at 560 F.Supp. 642.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 14, 1984 (App. A, infra 1a-15a). A timely petition for rehearing and suggestion for rehearing en banc was denied on July 25, 1984 (App. C, infra, 39a-40a), and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. United States Code, Title 29, section 621 (b), section 2(b) of the Age Discrimination in Employment Act, Pub.

L. No. 90-202, 81 Stat. 603, as amended by Publ. L. No. 95-256, 92 Stat. 189, provides:

> It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

2. United States Code, Title 29, section 623, section 4 of the Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 603, provides in relevant part:

> (a) It shall be unlawful for an employer--
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> * * * * *

> (f) It shall not be unlawful for an employer, employment agency, or labor organization--
>
> > (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonable necessary to the normal operation of the particular business...

3. United States Code, Title 49, section 1301(36), as amended, Pub. L. No. 95-163, §17(b), 91 Stat. 1286, Pub. L. No. 95-504, §2, 92 Stat. 1705, provides:

> "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

4. Code of Federal Regulations, Title 14, section 121.383(c) (1982), Federal Aviation Agency, 29 F.R. 19212,

as amended by Amdt. 121-144, 43 F.R. 22646, provides:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

5. Code of Federal Regulations, Title 29, section 860.102 (1981), Department of Labor, 33 F.R. 9172, rescinded by Equal Employment Opportunity Commission, 46 F.R. 47724, 47725 (Sept. 29, 1981), provides in relevant part:

> (a) Section 4(f)(1) of the Act provides that "it shall not be unlawful for an employer, employment agency, or labor organization. . .to take any action otherwise prohibited under paragraphs (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . .

(b) Whether occupational qualifications will be deemed to be "bona fide" and "reasonably necessary to the normal operation of the particular business", will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.

(c) The following are illustrations of possible bona fide occupational qualifications.

(d) Federal statutory and regulatory requirements which provide compulsory age limitations for hiring or compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public. This exception would apply, for example, to airline pilots within the jurisdiction of the Federal Aviation Agency. Federal Aviation Agency regulations do not permit air-

> line pilots to engage in carrier operation, as pilots, after they reach age 60. . . .

6. Department of Defense Procurement Regulations, Title 32, Code of Federal Regulations, volume II, section 9, part 9 (1982), provides in relevant part:

> 12-1901 Policy Regarding Nondiscrimination Because of Age. It is the policy of the Executive Branch of the Government (i) that contractors and subcontractors engaged in the performance of Federal contracts shall not, in connection with the employment, advancement, or discharge of employees or in connection with the terms, conditions, or privileges of their employment, discriminate against persons because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement. . . .

STATEMENT OF THE CASE

1. In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA) in order to prohibit discrimina-

tion in employment on the basis of age. 29 U.S.C. §621 et seq. (1976 and Supp. V 1981). The stated purposes of Congress in enacting the ADEA were to promote employment of older persons based on their ability rather than age, and to prohibit arbitrary age discrimination in employment. 29 U.S.C. §621(b). Section 4(a) of the ADEA makes it "unlawful for an employer. . .to discharge any individual . . .because of such individual's age. . . ." 29 U.S.C. §623(a)(1). There is an exception to this prohibition where an employer discharges an individual "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . ." 29 U.S.C. §623(f)(1).

Petitioner, Clark B. Gathercole (Gathercole), filed complaint against

his employer, Global Associates (Global), alleging that Global's discharge of Gathercole violated section 4(a) of the ADEA, 29 U.S.C. §623(a). Global invoked as a defense section 4(f) of the ADEA, 20 U.S.C. §623(f), contending that Gathercole's age was a "bona fide occupational qualification" (BFOQ) under that section. Jurisdiction of the District Court arose under 29 U.S.C. §626(c) and 28 U.S.C. §§1331, 1337. Following a three-day jury trial, a jury found that Global's policy requiring all of its pilots to retire at age 60 regardless of their individual health was not justified as a bona fide occupational qualification; and, therefore, violated the ADEA, 29 U.S.C. §621 et seq. (App. D, infra, 41a-42a). The District Court denied Global's motion for judgment notwithstanding the verdict.

560 F.Supp. 642 (App. B, infra, 16a-28a).

2. Gathercole was employed as an aircraft pilot by Global from 1964 until August 5, 1979, his 60th birthday, when he was removed from active flight status leading to his formal discharge on August 8, 1979 (RT 28).* Gathercole was discharged solely because of his age, 60 (RT 81).

Pursuant to its contract with the U.S. Army, Global provided logistical support services, including air transportation of passengers and cargo, for the Kwajalein Missile Range (Kwajalein) in the South Pacific (RT 203-8). The Army incorporated into its contract with Global the FAA's age 60 rule [14 C.F.R. §121.383(c)] which required the mandatory retirement of commercial airline

---

*"RT__" refers to the page number of the reporter's transcript of the jury trial in this case.

pilots at age 60. However, Global's contract excluded approximately 40 FAA Part 121 regulations for commercial airlines, many of which affected passenger safety (RT 170-75). Global's pilots flew public aircraft owned by the Army which were not within the jurisdiction of the FAA (RT 134-35).

Gathercole piloted two-engine Caribou aircraft which carried a maximum of 30 passengers (RT 39). The Caribou had a three-member crew, including a pilot, co-pilot and flight attendant (RT 41). Gathercole's duties consisted primarily of transporting passengers several times daily between three islands in the Kwajalein Atoll, the longest distance between the islands being 50 miles (RT 45). The weather conditions at Kwajalein were excellent, allowing for easy flying

by pilots (RT 45).

On July 28, 1978, Gathercole formally requested Global to waive its age 60 rule so he would not be discharged at 60 (RT 71). Global denied Gathercole's request on August 4, 1978, relying upon its contract with the Army and a possible increase in its insurance premium (RT 74). On July 5, 1979, Gathercole again requested Global and the Army to waive their age 60 rule, which was denied by the Army on Global's recommendation (RT 79-80).

Gathercole was competently and efficiently performing his duties when removed from his position as a pilot on August 5, 1979 (RT 81-2). Three months before his discharge in an annual evaluation report, Gathercole was rated from "good" to "excellent" in all areas of

work (RT 75). On August 3, 1979, Gathercole passed a FAA First Class Medical Examination only two days before his discharge (RT 80). Global intentionally discharged Gathercole because of his age, and was cognizant of the fact that its air operations were not governed by the FAA age 60 rule (RT 248, 267).

It was established at trial that age 60 is not related to the competency and fitness of pilots to safely perform their job duties (RT 162-66). Furthermore, the risks of incapacitating and debilitating diseases do not significantly increase for 60-year-old pilots, and medical science is able to accurately test individuals for incapacitating and debilitating diseases which would adversely affect a pilot's ability to safely perform his duties (RT 346). Global's

medical expert admitted at trial that there was no medical basis to validate Global's age 60 rule (RT 346).

//

//

//

//

//

//

//

//

//

//

//

//

//

//

//

//

//

//

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED BY HOLDING THAT GLOBAL ESTABLISHED A BFOQ AS A MATTER OF LAW BY RELYING UPON THE FAA'S AGE 60 RULE WHERE GATHERCOLE WAS NOT A COMMERCIAL AIRLINE PILOT.

The only issue the Court of Appeals addressed is whether "as a matter of law" Global's discharge of Gathercole solely because of his age meets the bona fide occupational exception (BFOQ) of the Age Discrimination in Employment Act (ADEA) [29 U.S.C. §623(f)(1)] (App. A, infra, 8a) (emphasis in the original). The Court of Appeals concluded that Global should have been afforded the protection of the BFOQ exemption of the ADEA, 20 U.S.C. §623(f)(1) (App. A, infra, 10a-12a).

The Court reasoned that Global was required to follow the express provision of its contract with the Army which in turn could accept at "face value" the Federal Aviation Agency's (FAA) "proclaimed standard of necessary minimum qualification" for commercial airline pilots [the FAA's age 60 rule, 14 C.F.R. §121.383(c)] (App. A, infra, 11a). According to the Court, Global was in no position to challenge the FAA's age 60 regulation without losing its Army contract (App. A, infra, 12a).

The Court of Appeals' holding squarely conflicts with that of the Sixth Circuit in Tuohy v. Ford Motor Co., 675 F.2d 842, 843 (6th Cir. 1982), on the issue of whether the FAA's age 60 rule automatically establishes a BFOQ for 60-year-old non-commercial airline pilots.

The Sixth Circuit in Tuohy v. Ford Motor Co., supra,held that Ford Motor Co., which employed private corporate pilots to fly passenger aircraft not controlled by part 121 of the FAA's regulations (14 C.F.R. §121.1 et seq.), could not rely upon the FAA's age 60 rule to establish that age less than 60 is a BFOQ as a mattery of law for its pilots. Id., at p. 845. "The Age 60 Rule which the FAA has never seen fit to apply to corporate pilots does not foreclose further inquiry." Id. Accord, Criswell v. Western Airlines, 709 F.2d 544, 551 (9th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3722 (U.S. March 16, 1984) (No. 83-1545), (improper for airline to rely upon medical rationale underlying the FAA's age 60 rule when the FAA never applied it to flight engineers for com-

mercial airlines).[1]

In this case it is not disputed that Global's air operations were not controlled by the FAA, and that Gathercole was a pilot of public aircraft which are not governed by the FAA's age 60 rule.

---

[1]In a related case, Orzel v. City of Wauwatosa, 697 F.2d 743, 750 (7th Cir. 1983), cert. denied, ___U.S.___, 104 S. Ct. 484 (1983), the Seventh Circuit rejected the City's contention that a congressional statutory mandatory retirement age for federal firefighters automatically established a BFOQ for the City's firefighters. The Seventh Circuit reasoned that "the fact that Congress has determined age 55 is an appropriate retirement age for one group of firefighters does not automatically establish that the same retirement age is a valid BFOQ. . .for a wholly different group of employees, operating under different working conditions and performing significantly different job functions."

49 U.S.C. §1301 (36).[2] The Army does not have a regulation comparable to the FAA's age 60 rule for either Army pilots or pilots employed by civilian contractors. In fact, a Department of Defense Procurement Regulation expressly prohibits contractors from discriminating on the basis of age except upon the basis of a BFOQ or statutory requirement. 32

---

[2]The FAA's age 60 rule only applies to a small segment of the flying population, that is commercial airline pilots covered by 14 C.F.R. §121.383(c). The petitioner's aviation expert testified at trial that the FAA's age 60 rule did not apply to Gathercole since he piloted "public aircraft" (RT 135), and that the FAA's age 60 rule does not even apply to its own pilots who fly passengers (RT 161). Petitioner introduced evidence showing that his job with Global, piloting a small piston-powered plane carrying personnel short distances between South Pacific islands, was substantially different from the job of a commercial airline pilot, flying jet airliners over much longer distances, through more variable weather, and in more crowded airspace (RT 39-45).

C.F.R. vol. II, §9, pt. 9 (1982). Global was merely complying with a discriminatory contractual requirement, not a federal regulatory requirement comparable to the FAA's age 60 rule. The District Court correctly held that "the fact that the Army seeks to require [Global] to engage in discriminatory employment practices does not insulate [Global] from liability under the Act . . ." 560 F.Supp. at p. 645 (App. B, infra, 21a-22a).

The Court of Appeal erred by holding Global's age 60 limitation lawful despite the fact that Global failed to prove at trial that the age 60 limitation was reasonably necessary for passenger safety. The Ninth Circuit's opinion is contrary to the other Circuit Courts which have required that the em-

ployer has the burden of proving that there is a factual basis for a BFOQ. The employer must meet a two-prong test to establish a BFOQ: first, the age limitation must be reasonably necessary to the essence of its business; and second, that there is a factual basis for believing that all or substantially all persons over a certain age would be unable to perform the duties of the job safely and efficiently, or that it is impossible or impractical to ascertain the difference between older employees who can and cannot perform the job safely. Tuohy v. Ford Motor Co., supra, 675 F.2d at p. 844-45; Smallwood v. United Air Lines, 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 456 U.S. 1007, 102 S.Ct. 2299 (1982) (age 35 not BFOQ for commercial airline pilots); ALPA v. Trans World

Airlines, 713 F.2d 940, 950-51 (2nd Cir. 1983), cert. granted, 52 U.S. L.W. 3625 (U.S. 1984) (No. 83-997), cert. granted sub nom., ALPA v. Thurston, 52 U.S.L.W. 3720 (U.S. April 2, 1984) (No. 82-1325) (age 60 not BFOQ for flight engineers of commercial airliners); Monroe v. United Air Lines, 736 F.2d 394, 400 (7th Cir. 1984) (whether age 60 BFOQ for flight engineers); Criswell v. Western Airlines, Inc., supra, 709 F.2d at p. 550-51 (age 60 not BFOQ for flight engineers); Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir. 1977), cert. denied, 434 U.S. 966 (1977), reaff'm under law of the case, 627 F.2d 858, 864-65 (8th Cir. 1980) (age 52 not BFOQ for test pilot). The BFOQ is an extremely narrow exception to the general prohibition against age discrimination.

Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (sex based discrimination); 29 C.F.R. §860.102(b) (1982). The BFOQ defense must relate to the actual ability of the employee to perform the particular job. Smallwood v. United Air Lines, Inc., supra, 661 F.2d at p. 307; Tuohy v. Ford Motor Co., supra, 675 F.2d at p. 844. As such, whether a BFOQ has been proven is a question of fact which can only be reviewed on appeal under the "clearly erroneous" standard of review (Smallwood v. United Air Lines, supra, 661 F.2d at p. 305; Houghton v. McDonnell Douglas Corp., supra, 553 F.2d at p. 564); which the Court of Appeals erroneously failed to do in this case.

The burden was upon Global, the employer, to demonstrate that its age limitation was reasonably necessary to the

essence of its business, i.e., passenger safety, and that there was a factual basis for believing that it was impossible or impractical to ascertain whether 60-year-old pilots were able to safely perform the duties of their jobs. Yet, as the District Court correctly noted in denying Global's motion for judgment notwithstanding the verdict, Global failed to sustain its burden of proof (App. B, infra, 22a-23a). Therefore, the Court of Appeals erred by holding that Global established a BFOQ as a matter of law simply because the FAA's age 60 rule had been incorporated into its Army contract, despite the fact that the FAA has never seen fit to apply the rule to non-commercial airline pilots.

For these reasons, the petition should be granted to resolve the conflict

between the Ninth Circuit and Sixth Circuit (Tuohy v. Ford Motor Co., supra) as to whether an employer may establish a BFOQ as a matter of law by applying the FAA's age 60 rule to non-commercial airline pilots.

II. THE DEPARTMENT OF LABOR REGULATION (29 C.F.R. §860.102) INTERPRETING THE BFOQ EXEMPTION OF THE ADEA DOES NOT INSULATE GLOBAL FROM LIABILITY BY ESTABLISHING A BFOQ AS A MATTER OF LAW.

To support its conclusion that Global was exempt from liability, the Court of Appeals further relied upon the Department of Labor regulation [29 C.F.R. §860.102(1981)][3] interpreting the BFOQ

---

[3]The Equal Employment Opportunity Commission has rescinded this regulation since Gathercole was discharged. The

exemption of the ADEA (App. A, infra, 13a-15a). The Court completely ignored subdivision (b) of this regulation which clearly states that the employer has the burden of proving that there is a factual basis for the age limitation. Subdivisions (c) and (d) provide that "illustrations of possible" BFOQ's are "federal statutory and regulatory requirements... clearly imposed for the safety and convenience of the public," for example, the FAA's age 60 rule for commercial "airline pilots within the jurisdiction

---

EEOC's new ADEA interpretations do not refer to the FAA rule as an example of a BFOQ "to avoid the appearance that [the example] had received the imprimatur of the Commission." 46 Fed. Reg. 47724, 47725 (Sept. 29, 1981).

The authority for administering the ADEA was transferred to the EEOC from the Department of Labor in July, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); see also Executive Order 12144, 44 Fed. Reg. 37193.

of the [FAA]." Subdivisions (c) and (d), contrary to the Court's reasoning, do not create exceptions to the general definition of a BFOQ provided by subdivision (b); but rather, subdivisions (c) and (d) merely suggest "possible" examples of BFOQ's for which the employer has the burden of proving a factual basis.

The Labor regulation, when subdivisions (b), (c) and (d) are read together, cannot reasonably be read in light of the ADEA, and the near unanimous opinions of the other Circuit Courts, to establish a BFOQ as a matter of law for government contractors such as Global.[4]

---

[4]No other Court considering this Labor regulation has held that it creates a BFOQ as a matter of law for any employer. Orzel, supra, 697 F.2d at 748 n.10; ALPA v. TWA, supra, 713 F.2d at p. 951; EEOC v. City of St. Paul, 671 F.2d 1162, 1167 (8th Cir. 1981). See also EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982), where the Ninth Circuit,

Furthermore, Global was not complying with a "federal regulatory requirement" since the FAA's age 60 rule did not apply to Global. Global was simply complying with a discriminatory contractual requirement. Because the Army incorporated the FAA's age 60 rule into a single contract does not transform it into regulation comparable in scope to that of the FAA. There is no Army regulation or general regulatory requirement that Army pilots, its contractor's pilots, or other pilots flying into Kwajalein airspace be less than 60.

And finally, Global did not prove that its age 60 rule was "clearly imposed" for passenger safety. The only

---

citing 29 C.F.R. §860.102, stated that the BFOQ exception is "a narrow one with the burden upon the employer to establish the applicability to the particular circumstances of each case." 666 F.2d at p. 376 n.7.

evidence adduced at trial by Global of the Army's basis for the rule was a single self-serving sentence from a letter by an Army official stating that the rule was imposed for "reasons of safety in air transportation at the Kwajalein Missile Range." Global failed to prove that there was an evidentiary basis for the Army applying an age limitation to Global's pilots at Kwajalein.

Thus, the Court of Appeals erred by interpreting the Labor regulation to create a BFOQ as a matter of law for Global's age limitation. Congress's intent in enacting section 4(f) of the ADEA was to create an extremely narrow BFOQ exception. If the Labor regulation broadens the exception to that degree, then the regulation is contrary to the intent of the Congress in enacting the

ADEA; and therefore, the regulation would be void.

III. THE COURT ERRONEOUSLY ALLOWS THE ECONOMIC INTEREST OF GLOBAL IN MAINTAINING ITS ARMY CONTRACT TO JUSTIFY ITS BFOQ DEFENSE.

The Court of Appeal observed that Global was placed in a "patently unjust dilemma"--either break its contract with the Army and risk losing "the benefit of its present contract," or "fail in its obligation to obey a statutory command of the government" (App. A, infra, 12a-13a).[5] By so ruling, the Court has im-

[5]The Court's statement is based on two mistaken assumptions. Contrary to the Court's assumptions, Global could have requested an exemption for its age limitation from the EEOC (29 U.S.C. §628, §9 ADEA); and Global was not obeying a "statutory" command.

permissibly allowed Global's economic interest in maintaining its Army contract to legally excuse its unlawful discharge of Gathercole.

It is well established that economic considerations of an employer cannot be the basis for a BFOQ under the Act. EEOC v. County of Los Angeles, 706 F.2d 1039, 1042 (9th Cir. 1983), cert. denied, ___ U.S.___, 104 S.Ct. 984 (1984); cf. Smallwood v. United Air Lines, Inc., supra, 661 F.2d at p. 307; Orzel v. City of Wauwatosa, supra, 697 F.2d at p. 755. See also 29 C.F.R. §860.103(h) (1981) (superseded); cf. City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (cost-justification defense unavailing in a Title VII action). The Court thus erroneously allows Global's economic considerations to establish a BFOQ as a mat-

ter of law. Certainly a contract, even when one party to the contract is the U.S. government, cannot contravene an act of Congress, the ADEA.

The ADEA, and other laws prohibiting employment discrimination, would be rendered meaningless if an employer could escape liability by incorporating discriminatory provisions into a contract, and then defend itself by arguing that it had "no choice" but to discriminate against an employee because it might otherwise lose its contract.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judg-

ment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

KIM MALCHESKI
MALCHESKI, PARKER
& RANDOLPH
707 Cortland Avenue
San Francisco, CA 94110

Attorney for Petitioner

October 1984

APPENDIX

APPENDIX

Page

A. Opinion of the U.S. Court of Appeals for the Ninth Circuit--filed March 15, 1984, and modified July 2, 1984.....1a

B. Order of the U.S. District Court, Northern District of California, filed March 31, 1983.....16a

C. Order of the U.S. Court of Appeals for the Ninth Circuit, denying Petition for Rehearing, filed July 25, 1984.....39a

D. Judgment of the U.S. District Court, Northern District of California, filed January 7, 1983.....41a

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARK B. GATHERCOLE, Plaintiff-Appellee Cross-Appellant, v. GLOBAL ASSOCIATES, Defendant-Appellant-Cross Appellee.	)	Nos. 83-1885, 83-1894, 83-1920 D.C. No. C-81-2976 SAW OPINION

Appeal from the United States District Court for the Northern District of California--Hon. Stanley A. Weigel, District Judge, Presiding

Argued and Submitted--December 15, 1984

Decided--March 14, 1984

Amended--July 2, 1984

Before: MERRILL, Senior Circuit Judge, BOOCHEVER, Circuit Judge, and WYZANSKI,* Senior District Judge.

WYZANSKI, Senior District Judge:

Appellant Global Associates (Global)

---

*Honorable Charles Edward Wyzanski, Jr., Senior District Judge, District of Massachusetts, sitting by designation.

appeals from the district court's March 31, 1983 judgment that it is liable to appellee Clark B. Gathercole for its violation of his rights under §4(a) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623(a), in that Global discharged him because of his age from his employment as an airline pilot on the airline-type passenger flights used by the U.S. Army's Ballistic Missile Defense System Command for Military Operations.

It is undisputed that: (1) Global employed Gathercole as an airline pilot stationed on Kwajalein Island, the principal location of the Kwajalein Missile Range. (2) Gathercole's sole duty was to pilot passenger aircraft on the airline-type passenger flights used by the U.S. Army's Ballistic Missile Defense System Command for Military Operations. From the time that Global first employed

Gathercole for a temporary period, from June 12, 1979 to August 5, 1979, (see Exhibit A attached to Answer to Complaint), it has been clear that Gathercole's "Services are to be performed as assigned by Employer [Global] in the Marshall Islands in connection with Employer's performance under Government Contract NO. DASG60-75-C-0001 or such other concurrent or successor contracts as may be executed between Employer and the Government, or at such other place or in such other connection as may be designated by Employer." And (3) on August 5, 1979 Gathercole had his 60th birthday. Only because on that day Gathercole reached 60 Global removed him from active flight status, and on August 8, 1979 discharged him.

Gathercole complains that Global's discharge action violated his right under

§4(a) of the ADEA, 29 U.S.C. §623(a) which provides that:

> (a) It shall be unlawful for an employer -- (1)...to discharge any individual...because of such individual's age.

In reply to that complaint Global invokes the following exculpatory provision set forth in §4(f) of the ADEA, 29 U.S.C. §623(f):

> (f) It shall not be unlawful for an employer...-- (1) to take any action otherwise prohibited under subsection[] (a) ...of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business...

Global contends that:

(1) within the meaning of §4(f), "the particular business" in which Global employed the plaintiff was that of pilot on the airline-type passenger flights used by the U.S. Army's Ballistic Missile Defense System Command for Military

Operations;

(2) such employment of the plaintiff was exclusively incident to a contract between Global and the United States Department of the Army specifying that Global shall provide air transportation for the Kwajalein Missile Range.

(3) The contract between Global and the U.S. Army's Ballistic Missile Defense System Command for Military Operations [Defendant's Exhibit 7] provided, at p.4, that Global, as contractor, shall "do all things necessary for the accomplishment of satisfactory and timely performance of the requirements outlined in [a specific] Scope of Work" document. That document, in turn, explicitly adopted 350 FAA air-line safety regulations. One of those adopted regulations of the FAA [see 29 C.F.R. §860.102 (1981)] established a 60-year age limitation for pilots.

We do not know from the record whether as a fact the FAA held any hearing in connection with adoption of this 60-year age regulations (though there is, of course, a presumption that the FAA complied with its official obligation to have done so). Nor does the record show whether the regulation was adopted on the basis of evidence, or whether the FAA had before it (in its agency files or elsewhere) supporting evidence. All we have in the district court record is the uncontradicted recital of an army officer in a letter to Global to the effect that the 60-year age regulation was imposed "for reasons of safety in air transportation at the Kwajalein Missile Range." [See Defendant's Exhibit 9, Plaintiff's Exhibit 8] [See 560 F. Supp. 644-645]

Before Global discharged Gathercole, he on July 5, 1979 had informed Global of

his contention that the Age 60 Rule in the Army's regulation did not satisfy the requirements of the exculpatory provision set forth in §4(f) of the ADEA, quoted supra. Global rejected that contention.

Then Gathercole requested Global to procure from the Army a waiver of the Age 60 Rule in his case. Accordingly, Global applied for a waiver by the Army; but the Army declined to grant it.

As heretofore stated, on August 5, 1979, Gathercole's 60th birthday, Global removed Gathercole from active flight status and on August 8, 1979 it formally discharged him.

Gathercole's complaint (resting solely on defendant Global's alleged unlawfulness in discharging him as a pilot, and not claiming that Gathercole was entitled to any other position) was heard in the Northern District of California by

Judge Weigel and a jury. The jury returned a verdict in favor of plaintiff Gathercole. On March 31, 1983, for reasons set forth in an opinion, Gathercole v. Global Associates, 560 F. Supp. 642 (N.D.Cal.1983), the court denied defendant's motion for judgment notwithstanding the verdict, or for a new trial, and entered judgment for plaintiff in accordance with the verdict.

The only one of the several issues raised before us which we need to consider is whether as a matter of law Global's action discharging Gathercole meets the standard for exculpation established by §4(f) of the ADEA, 29 U.S.C. §623(f).

The district court ruled that Global was not immunized by the contract and the FAA regulation indirectly incorporated therein because there was no evidence that [in words which Judge Weigel strange-

ly quoted at 560 F. Supp. 645 from an opinion which in its holding was flatly contra to Judge Weigel's own opinion, Tuohy v. Ford Motor Co., 490 F. Supp. 258, 264 (E.D. Mich.1980 rev'd on other grounds, 675 F.2d. 842 (6th Cir. 1982)] "'an appropriate federal agency has determined after a full hearing that, as to persons over the age of 60, it is not possible to use factors other than age to predict the likelihood of the onset of a sudden condition that could imperil the passengers' (emphasis added)."

There is a certain plausibility in the district court's view that "Absent evidence of the Army's basis for its decision, the fact that the Army seeks to require defendants to engage in discriminatory employment practices in violation of the ADEA does not insulate defendants from liability under that Act." 560 F.

Supp. at 645 (footnote omitted). But we are of the opinion that the district court's view will not withstand close analysis.

§4(f) of the ADEA, 29 U.S.C.§623(f) provides that a liability which would otherwise exist on account of action taken by an employer due to the age of the complaining employee does not exist if that age factor is "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business".

Here the so-called BFOQ was not determined by the Army's reliance on its own wisdom as to the reliability of pilots over 60 years of age but on the Army's reliance on the judgment of the FAA as expressed in FAA formal regulations applicable to 60-year-old airplane pilots of various types. It would be anomalous

for the Army to question that FAA as to whether the evidence before that agency had been sufficient to enable it to reach a sound conclusion. Surely it could presume that the FAA both procedurally and substantively performed its duty.

It is sufficient that the Army, knowing of the expertise of the FAA, and of its obligation as a public agency to perform its official duty, accepted at face value its proclaimed standard of necessary minimum qualification. The Army is not a court of review for the FAA. Nor is it incumbent upon the Army to probe the methods of the FAA. The Army may reasonably assume that the government's expert agency with respect to flight safety acted appropriately both procedurally and substantively.

Global is in an even better defensive

position than the Army. That private company received its contract on the express proviso that it would follow official regulations. For it to have failed to do so would have in all probability caused Global to be justly charged with breach of contract.

Moreover, certainly Global was in no position to challenge the applicability and soundness of or evidentiary support for the FAA regulations.

In short, the judgment against Global was erroneous because the district court failed to afford Global the protection conferred by §4(f) of the ADEA, 29 U.S.C. §623(f).

Our conclusion is fortified by our awareness that the district court's ruling would subject Global to a patently unjust dilemma -- either to break its contractual promise to the government (and thus im-

peril its own likelihood of retaining the benefit of its present contract and its hope of comparable future contracts) or to fail in its obligation to obey a statutory command of the government.[1]

To cap the matter, we note that at least since 33 FR 9172, June 21, 1968, 29 C.F.R. §860.102 (1981), the Wage and Hour Division of the United States Department of Labor, in its official regulations interpreting §4(f)(1) of the ADEA has contained the following interpretive statement:

> (c) The following are illustrations of possible bona fide

---

[1] Global's position is in contrast to that of the employer in Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) which attempted to justify failure to promote a woman because of the preference of customers in a foreign country to deal with male business representatives. Unlike Wynn Oil Co., Global was subject to statutory and regulatory requirements enacted to promote safety.

> occupational qualifications.
>
> (d) Federal statutory and regulatory requirements which provide compulsory age limitations for hiring or compulsory retirement, without reference ot the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public. This exception would apply, for example, to airline pilots within the jurisdiction of the Federal Aviation Agency. Federal Aviation Agency regulations do not permit airline pilots to engage in carrier operations, as pilots, after they reach age 60.

It is not disputed that the department of the Army has plenary power to regulate aviation at the Kwajalein Missile Range and that the Global contract with the Army in its "Scope of Work" provisions required Global to discharge a pilot who reached age 60. Thus the 60-year requirement was "regulatory" within the meaning of 29 C.F.R. 860.102 (1981), just quoted. Furthermore, the 60-year regulatory requirement was "clearly imposed by

the FAA and by the Army for the safety and convenience of the public". Starr v. Federal Aviation Administration, 589 F.2d 307, 309 (7th Cir. 1978) and cases there cited.

Reversed.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLARK B. GATHERCOLE, Plaintiff, v. GLOBAL ASSOCIATES, INTERNATIONAL ATLAS SERVICE, ATLAS CORPORATION, H.C. SMITH CONSTRUCTION COMPANY, JAMES J. MORENA, D.D. MCAFEE, and DOES I through XX, inclusive, Defendants.	)	No. C-81-2976 SAW Filed March 31, 1983

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL

Plaintiff filed this action in 1981 alleging that he was discharged by defendant Global Associates (Global) in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. Prior to his discharge, plaintiff was em-

ployed by Global as a co-pilot and then as a pilot of aircraft from approximately 1964 to 1979. By contract with the Department of the Army (Army), Global provides air transportation for the Kwajalein Missile Range (Kwajalein) on the Marshall Islands. On August 5, 1979, when plaintiff reached the age of sixty, he was discharged as an aircraft pilot by Global on the basis of his age.

Following a three day trial, on January 7, 1983, the jury returned a verdict in favor of plaintiff in the sum of $226,406.50. Defendants move for judgment notwithstanding the verdict or, in the alternative, for new trial.

A motion for judgment notwithstanding the verdict is properly granted only "if, without accounting for the credibility of the witnesses, * * * the evidence and its inferences, considered as a whole and

viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion--that the moving party is entitled to judgment notwithstanding the adverse verdict." William Inglis & Sons Baking Co. v. ITT Cont. Baking Co., 668 F.2d 1014, 1026 (9th Cir.), cert. denied, 103 S.Ct. 57-58 (1982). A new trial is appropriate if "the jury's verdict was clearly contrary to the weight of the evidence." Id. at 1027.

Defendants' Motion for Judgment Notwithstanding the Verdict

Defendants offer three grounds in support of their motion. First, they assert that the so-called "Age 60 Rule," which requires mandatory retirement of pilots at age 60, is a bona fide occupational qualification (BFOQ) for their pilots under Section 4(f) of the ADEA, 29 U.S.C.

§ 623(f), because the army incorporated the age 60 Rule into Global's employment contract. Defendants further urge that the Army has regulatory authority over air transportation on Kwajalein within the meaning of 29 C.F.R. § 860.102 (1982)[1] and, pursuant to that authority, has validated the Age 60 Rule for Global's

---

[1]That Section states in pertinent part:

> The following are illustrations of possible bona fide occupational qualifications
>
> (d) Federal statutory and regulatory requirements which provide compulsory age limitations for hiring or compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public. This exception would apply, for example, to airline pilots within the jurisdiction of the Federal Aviation Agency. Federal Aviation Agency regulations do not permit airline pilots to engage in carrier operations, as pilots, after they reach age 60.

pilots.

The record does not support defendants' motion on this ground. Assuming that the Army has regulatory authority over air transportation on Kwajalein comparable to that which the Federal Aviation Agency (FAA) exercises over commercial air transportation,[2] the evidence does not demonstrate that the Army "clearly imposed [the Age 60 Rule on Global's operations on Kwajalein] for the safety and convenience of the public." 29 C.F.R. § 860.102 (1981). Defendants presented no evidence at trial of the Army's basis for requiring that its airline contractor at Kwajalein adhere to the Age 60 Rule other than a letter from an Army official to plaintiff stating that the Rule was imposed "for reasons of safety in air

---

[2] See 14 C.F.R. Part 121.

Range."[3] This bald assertion does not constitute evidence that "an appropriate federal agency has determined after a full hearing that, as to persons over the age of 60, it is not possible to use factors other than age to predict the likelihood of the onset of a sudden condition that could imperil the passengers" (emphasis added). Tuohy v. Ford Motor Co., 490 F. Supp. 258, 264 (E.D. Mich. 1980), rev'd on other grounds, 675 F.2d 842 (6th Cir. 1982). Absent evidence of the Army's basis for its decision, the fact that the Army seeks to require defendants to engage in discriminatory employment practices in violation of the ADEA does not insulate defendants from liability

---

[3]Defendant's Ex. 9. In addition, defendants failed to demonstrate that all air traffic flying into Kwajalein was required to adher to the Age 60 Rule.

under that Act.[4]

Second, defendants assert that medical evidence presented at trial conclusively establishes that the Age 60 Rule is a BFOQ for Global's pilots. Because the parties presented conflicting evidence on this issue, defendants are not entitled to judgment or to a new trial on this ground. The jury could reasonably have concluded from the evidence that application of the Age 60 Rule to Global's pilots was not reasonably necessary to the essence of its business, that Global did not have a sufficient factual basis for believing that pilots past age 60 would be unable to perform their duties

---

[4]Enforcement of the ADEA under these circumstances will not place defendants at a competitive disadvantage in competing for Army contracts. See Gathercole v. Global Associates, 545 F. Supp. 1280, 1282 (N.D. Cal. 1982).

safely and efficiently, and that it was not highly impractical to deal with pilots past age 60 on an individualized basis.[5]

---

[5]The BFOQ instruction stated:

> If you find that the plaintiff has persuaded you by a preponderance of the evidence that he was terminated by the defendants and that his age was a determining factor in his termination, then you must consider the defendants' defense that age is a "bona fide occupational qualification" for its pilots. This defense is usually abbreviated "BFOQ."
>
> The burden of proof to establish a BFOQ is on the defendants. If Defendants establish a BFOQ by a preponderance of the evidence, then their age discrimination is lawful under federal law.
>
> To establish a BFOQ, defendants must satisfy both elements of a two-pronged test. First, defendants must show that the BFOQ is reasonably necessary to the essence of defendants' business. In this regard, I instruct you that the normal essence of defendants' business is the safe transportation of air passengers. Second, defendants must show that they had reasonable cause to believe, that is,

See Criswell v. Western Air Lines, 514 F. Supp. 384, 389 (C.D. Cal. 1981).

Third, defendants contend that their good faith reliance on the Department of Labor's validation of the Age 60 Rule, see 29 C.F.R. § 680.102 (1981), consti-

---

> a factual basis for believing, that all or substantially all persons over age sixty (60) would be unable to perform safely and efficiently the duties of a pilot; or that it is impossible or highly impractical to deal with each pilot over age sixty (60) on an individualized basis to determine his particular ability to perform his job safely.
>
> If you find that defendants have failed to prove a BFOQ defense, then you must find for the plaintiff.

Defendants' objection to this instruction, and the the Court's failure to give further instructions concerning the relationship between passenger safety and the BFOQ defense, is groundless. See Smallwood v. United Air Lines, 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 102 S.Ct. 2299 (1982); Harriss v. Pan American World Airways, 649 F.2d 670, 676-77 (9th Cir. 1980); Criswell v. Western Air Lines, 514 F. Supp., 384, 389 & n.7 (C.D. Cal. 1981).

tutes a defense to plaintiff's claim pursuant to Section 7(e) of the ADEA, 29 U.S.C. § 626(e), which incorporates Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259. That Section provides in pertinent part:

> (a) * * * [N]o employer shall be subject to any liability or punishment * * * if he pleads and proves that the act or omission complained of was in good faith conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section * * *
>
> (b) The agency referred to in subsection (a) of this section shall be--
>
> (1) in the case of the Fair Labor Standards Act of 1938, as amended--the Administrator of the Wage and Hour Division of the Department of Labor;
>
> (2) in the case of the Walsh-Healey Act--the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and
>
> (3) in the case of the Bacon-Davis Act--the Secretary of Labor.

29 U.S.C. § 259. Defendants are not entitled to a good faith defense based upon 29 C.F.R. § 860.102 (1981), because that regulation validates the FAA's Age 60 Rule only for commercial pilots and not for pilots of "public" aircraft. Defendants' pilots operated aircraft owned by the Army. Hence, defendants did not act "in conformity with" that regulation when they discharged plaintiff. Thus, their asserted reliance on 29 C.F.R. § 860.102 (1981) does not entitle them to a good faith defense. See Gathercole v. Global Associates, 545 F. Supp. 1280 (N.D. Cal. 1982); Pilkenton v. Appalachian Regional Hosp. 336 F. Supp. 334, 340 (W.D. Va. 1971).

Defendants also assert that their reliance in discharging plaintiff on the Army's adoption of the Age 60 Rule in its contract with Global entitles them to a

good faith defense. The good faith defense, however, is available to defendants only if they relied in good faith upon a regulation issued by the Department of Labor. See 29 U.S.C. § 259. The Army is not authorized to issue binding regulations interpreting the ADEA, which is administered by the Department of Labor. See United States v. Stocks Lincoln Mercury, 307 F.2d 266, 271 (10th Cir. 1962) (good faith defense requires that regulation be issued by agency "vested with primary or final authority to administer the provisions of the particular Act in question"). Consequently, assuming that the Army's incorporation of the Age 60 Rule into its contract with Global constitutes an administrative regulation within the meaning of 29 U.S.C. §259(a), defendants cannot invoke that regulation as the basis for a good

faith defense.[6]

Defendants' Motion for New Trial

Defendants offer four grounds in sup-

---

[6]Defendants also contend that the Court's instruction to the jury on the ADEA's good faith defense was improper. That instruction stated:

> If you find that plaintiff has established a prima facie case of unlawful age discrimination, then you must consider defendants' second defense, that they reasonably relied in good faith on an administrative regulation to conclude that their termination of plaintiff would be lawful. For defendants to establish this defense, they must prove that in terminating plaintiff they acted in actual conformity with the administrative regulation. Defendants did not act in actual conformity with the regulation, and hence this defense is not available to them, if the regulation they relied upon to terminate plaintiff did not actually apply to plaintiff and govern plaintiff's employment by defendants.

Defendants' objection to this instruction is meritless. See 29 U.S.C. §§ 626(e), 259; 29 C.F.R. §§ 790.14(a), 790.14(c) (1981); see also Pilkenton v. Appalachian Regional Hosp., 336 F. Supp. 334, 340 (W.D. Va. 1971).

port of their motion for new trial. First, they contend that submission of a general verdict without interrogatories to the jury was improper and prejudicial. Use of a general verdict is proper in an ADEA action. See Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1317 (9th Cir.), cert. denied, 103 S.Ct. 131 (1982).

Second, defendants urge that comments by the Court during trial prejudiced their case and hence require that a new trial be granted. A federal district court judge has broad powers to control the conduct of trials, to examine witnesses, and to comment on evidence. See Quercia v. United States, 289 U.S. 466 (1933). At the same time, a judge must make "clear to the jury that all matters of fact are submitted to their determination." Id. at 469. The jury was so charged in this case (Tran., Jan. 7, 1983, at 79-80).

Under these circumstances, the Court's comments were neither improper nor prejudicial to defendants.

Third, defendants contend that the admission into evidence of Defendants' Exhibit 16, the Report of the National Institute on Aging Panel on the Experienced Pilots Study, was improper, prejudicial, and requires that a new trial be granted.[7] That study is a public report that Congress ordered be prepared and hence was properly admitted pursuant to Fed. R. Evid. 803 (8)(B).

Finally, defendants argue that the jury's damages award was excessive, and that consequently a new trial is required. They offer three grounds in support of this contention. First, defendants urge

---

[7]Defendants' Exhibit 16 was admitted on plaintiff's motion and over defendants' objection (Tran., Jan. 7, 1983, at 3-4).

that plaintiff is entitled to backpay only for the period from the date of his discharge, August 8, 1979, to the date his "FAA Class I Flight Certificate" (Flight Certificate) expired, February 3, 1980.[8] After his Flight Certificate Expired, defendants assert, plaintiff was not qualified for employment as a pilot by Global.

This contention is without merit. After his discharge by Global, plaintiff retired as a commercial pilot and obtained employment outside the field of aviation. Plaintiff was not required to maintain his Flight Certificate once he had been discharged. See Hannan v. Chrysler Motors, 443 F. Supp. 802, 805 (E.D. Mich. 1978). A plaintiff wrongfully discharged

---

[8] At trial, plaintiff requested backpay damages from the date of his discharge to December 31, 1982, five days prior to the commencement of trial. See Plaintiff's Ex. 10.

under the ADEA may recover those wages and benefits "to which plaintiff would [have been] entitled had he remained employed by defendant until the trial date * * * *" Brennan v. Ace Hardware Corp., 495 F.2d 368, 373 (8th Cir. 1974); see Rodriguez v. Taylor, 569 F.2d 1231, 1243 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (W.D. Ga. 1971). Thus, absent evidence that had plaintiff continued to be employed by Global as a pilot he would have been discharged prior to the date of trial for some reason other than his age, plaintiff is entitled to lost wages and benefits up to the date of trial.

Second, defendants assert they are entitled to a new trial on the ground that the jury made an improper award of

liquidated damages.[9] Under the ADEA, if an employer commits a willful violation of the Act the plaintiff may recover liquidated damages in an amount equal to his lost wages and benefits. 29 U.S.C. §§ 216(b), 626(b). Defendants argue that the evidence requires a finding that Global did not willfully violate the ADEA.

Neither the Act nor its legislative history describes what constitutes a willful violation. Courts have filled this void with a number of conflicting definitions. See, e.g., Syvock v. Milwaukee Boiler Mfg., 665 F.2d 149, 154-56 (7th Cir. 1981) (violation willful if defendant knew or reasonably should have known that action taken violated ADEA);

---

[9]The jury's award of $226,406.50 exceeded the $124,983.60 that plaintiff claimed constituted his lost wages and benefits. Thus, the jury awarded plaintiff liquidated damages.

Goodman v. Heublein, Inc., 645 F.2d 127, 131 & n.6 (2d Cir. 1981) (dicta) (violation is willful in any discriminatory treatment case, as opposed to a discriminatory impact case); Wehr v. Burroughs Corp., 619 F.2d 276, 279-83 (3d Cir. 1980) (violation willful if intentional, knowing, voluntary, or reckless); Leob v. Textron, Inc., 600 F.2d 1003, 1020 & n.27 (1st Cir. 1979) (dicta) (willfulness requires "specific intent" to disobey or disregard law); Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976) (violation willful if employer knew action might have implications under the ADEA). In this circuit, a violation of the ADEA is willful if the employer acted voluntarily, intentionally, or knowingly.[10]

---

[10] A willful violation does not require that the employer have knowledge that the contemplated action has "implications under the Act * * * *" Kelly, supra, 640 F.2d at 980.

Kelly v. American Standard, Inc., 640 F.2d 974, 979-80 (9th Cir. 1981). Thus, an employer who violates the ADEA by consciously discharging an employee based upon the employee's age commits a willful violation of the Act. See Goodman, supra, 645 F.2d at 131 n.6; Kelly, supra, 640 F.2d at 980. By contrast, an employer who violates the Act by using a selection criterion that is facially neutral with respect to age but has a discriminatory impact on older workers does not necessarily commit a willful violation.[11] See Kelly, supra, 640 F.2d at 980 & n.9; Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981).

---

[11] Under those circumstances, the violation would not be willful unless use of the facially neutral selection criterion was a mere pretext for purposeful discrimination based on age. Cf. Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112-13 (4th Cir. 1981).

Defendants in this case concede that they discharged plaintiff solely because of his age. This admission is sufficient to establish willfulness within the meaning of 29 U.S.C. § 626(b). Consequently, defendants are not entitled to a new trial based upon the jury's award of liquidated damages.

Third, defendants contend that the jury failed to subtract from plaintiff's lost wages and benefits all of his earnings, unemployment compensation, and Social Security early retirement benefits received after his discharge. The jury was not required to deduct plaintiff's early retirement benefits from his lost wages. See Naton v. Bank of California, 649 F.2d 691, 700 (9th Cir. 1981) (benefits plaintiff would have received had he retired voluntarily not deductible from lost wages). At trial, plaintiff asserted

that he suffered lost wages and benefits in the amount of $124,983.60 as a result of his discharge. See Plaintiff's Ex. 10. The jury should have offset against this amount wages in the sum of $12,058.00 and unemployment benefits in the amount of $2,288.00 that plaintiff received in mitigation of his damages. See Court Ex. 1. These deductions would have reduced plaintiff's damages to $110,637.60. The jury could have properly doubled this amount by awarding liquidated damages, and reached a total award of $221,275.20.

The jury's actual award of $113,203.25, which it doubled by granting liquidated damages to reach a total award of $226,406.50, is not inconsistent with the evidence. Plaintiff's calculations of his lost wages and benefits were estimates only, see Plaintiff's Ex. 10, and the jury's award, prior to doubling, was

only $2,565.65 higher than plaintiff's estimate of his lost wages less his earnings and unemployment compensation. The jury could have reasonably concluded from the evidence that plaintiff's estimate of his lost wages was too conservative, and accordingly adjusted it slightly upward. Under these circumstances, the jury's verdict was not inconsistent with the evidence. See Kelly v. American Standard, Inc., 640 F.2d 974, 985-86 (9th Cir. 1981).

Accordingly,

IT IS HEREBY ORDERED that defendants' motion for judgment notwithstanding the verdict or, in the alternative, for new trial is denied.

Dated: March 31, 1983.

/s/
Stanley A. Weigel
District Court Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARK B. GATHERCOLE,	)	No. 83-1885,
	)	83-1894,
Plaintiff-Appellee-Cross-Appellant,	)	83-1920
	)	D.C. No. C-81-
v.	)	2976-SAW
	)	
GLOBAL ASSOCIATES,	)	ORDER
	)	
Defendant-Appellant, Cross-Appellee.	)	Filed July 25, 1984
	)	

Before: MERRILL, Senior Circuit Judge, BOOCHEVER, Circuit Judge, and WYZANSKI,* Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote

*Honorable Charles Edward Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, sitting by designation.

on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CLARK B. GATHERCOLE, Plaintiff, vs GLOBAL ASSOCIATES, INTERNATIONAL ATLAS SERVICE, ATLAS CORPORATION, H. C. SMITH CONSTRUCTION COMPANY, JAMES J. MOREAN, D. D. MCAFEE, Defendants.	)	C 81-2976 SAW JUDGMENT Filed January 7, 1983

This action came on for trial before the Court and a jury, the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ADJUDGED that the plaintiff Clark B. Gathercole recover of the defendant Global Associates the sum of $226,406.50, with interest as provided by law, and his costs of action.

Dated: January 7, 1984

/S/

Stanley A. Weigel

District Court Judge